IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs November 20, 2008

STATE OF TENNESSEE v. STEVEN BERNARD SYDNOR

Direct Appeal from the Criminal Court for Davidson County
No. 2006-A-563 Mark J. Fishburn, Judge

No. M2007-02393-CCA-R3-CD - Filed February 2, 2010

A Davidson County Criminal Court jury convicted the appellant, Steven Bernard Sydnor, of second degree murder and theft of property valued between $1,000 and $10,000. He received a total effective sentence of twenty-five years in the Tennessee Department of Correction. On appeal, the appellant contends:

> (1) The trial court erred by denying a motion to suppress statements he made to police.
>
> (2) The trial court erred by denying a motion to suppress evidence found in his apartment because consent to search was obtained immediately after he had invoked his right to remain silent.
>
> (3) The trial court erred in admitting a photograph of the victim taken prior to her death.
>
> (4) The trial court erred in admitting as substantive evidence testimony regarding alleged incidents of threatening conduct by the appellant.
>
> (5) The trial court erred in allowing the State to present testimony regarding the victim's plans to attend a memorial service in Pennsylvania for her recently deceased grandparents.
>
> (6) The trial court erred in admitting graphic photographs of the victim's face and body.

(7) The evidence contained in the record is not sufficient to support the appellant's conviction for theft of property of the value of $1,000 or more, but less than $10,000.

(8) The trial court erred in imposing the maximum sentence for second degree murder.

Upon review, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID H. WELLES and JOHN EVERETT WILLIAMS, JJ., joined.

Jeffrey A. DeVasher (on appeal), Jonathan F. Wing (at trial), and Tyler Chance Yarbro (at trial), Nashville, Tennessee, for the appellant, Steven Bernard Sydnor.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Senior Counsel; Victor S. Johnson, III, District Attorney General; and Sarah Davis, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The appellant was indicted by the Davidson County Grand Jury on one count of the first degree murder of the victim, April Anderson, and one count of theft of property valued between $10,000 and $60,000, namely the victim's Honda Accord. The State's first witness at trial was Savannah Singer, one of the victim's five sisters. Singer testified that in November 2004, the victim and the appellant lived near them in Culver City, California. The relationship between the victim and the appellant was tumultuous, and the victim's family urged her to move to Tennessee to get away from him and be near other family members.

Singer stated that in January 2005, the victim was staying with friends, not with the appellant, after spending a week visiting family in Montana. Singer said the victim gave her the code to access the voice mail on the victim's cellular telephone. Three of the voice mail messages Singer heard were from the appellant; two were messages for the victim and the other was for the victim's youngest son. In one message to the victim, the appellant told her that he knew she was back in town and that she should return his call. In the second message to the victim, the appellant said that he knew where the victim and her children were living.

In the message to the victim's youngest son, the appellant said that he knew where the child went to school. Singer stated that all three messages were "sinister" and "threatening" in tone.

Singer said that because of the messages, she helped the victim get out of town. The victim moved to Tennessee and began living intermittently with her sisters, Holly Anderson and Tina Anderson.[1] In October 2005, the victim began living with the appellant, who had also moved to Tennessee.

Singer testified that she last talked with the victim one week prior to her death. The victim mentioned that she was sad because of the death of their grandparents in October and that she was looking forward to being with family at the grandparents' memorial service, which was scheduled to be held in Pennsylvania on November 26, 2005. The victim planned to drive her car to Pennsylvania after Thanksgiving dinner on November 24, 2005, and several family members were scheduled to ride with her. Singer said that the appellant had not been invited to the memorial service.

Hillary Selvin, the partner of the victim's sister, Bonnie Anderson, testified that she first met the appellant one morning in February 2005. Selvin saw the victim and the appellant sitting in the victim's Honda Accord which was parked in the driveway of the home Selvin and Bonnie shared. The appellant and the victim were arguing, and the appellant would not get out of the victim's car. Shortly thereafter, the victim left to take the appellant to a bus station. The victim returned fifteen minutes later, visibly upset, crying, scared, and anxious. Selvin and Bonnie spoke with the victim for hours, suggesting places where she could get help dealing with "whatever issues she was dealing with." Selvin said they also urged the victim to get out of town and go to Montana to stay with her mother and brother. The victim left for Montana about twenty-four hours later, putting her belongings in storage while she was away. When the victim returned to California approximately one week later, she gave away the items that had been in storage, preparing to move to Tennessee to stay with one of her sisters, Holly or Tina, who were living near Nashville.

Selvin testified that after the victim returned from Montana but before she left California for Tennessee, Selvin listened to the victim's voice mail messages and heard three messages from the appellant. Selvin said:

> [T]here were a couple of messages, one in which [the appellant] said, "I know you dropped off the microwave at my sister's

[1] Some of the witnesses in this case share a surname. Therefore, for clarity, we have chosen to utilize their first names. We mean no disrespect to these individuals.

> house, I know you're back in town," and "I know you're back in town and, you know, I know where your girls live. I know where you are and I'm going to take care of you."

Selvin also heard a message the appellant left for the victim's youngest son, wherein the appellant said, "I know where you go to school. . . . I know your school route and I know where you live, and I know . . . what school you go to and I know how to get to you." Selvin said all of the messages were "very threatening." Selvin said that the victim moved to Nashville in March or April 2005, first staying with her sister Holly then with her sister Tina.

Officer Shane Fairbanks of the Metropolitan Nashville Police Department testified that on November 22, 2005, he was driving down Sylvan Street toward South Seventh Street when he saw the appellant walking down South Seventh Street. When the appellant saw Officer Fairbanks, he walked toward the officer with his hands in the air as if he were surrendering. Officer Fairbanks radioed dispatch that he was stopping, and he requested backup. After Officer Fairbanks stepped out of his car, the appellant continued to approach with his hands in the air.

The appellant told Officer Fairbanks that he wanted to turn himself in. Officer Fairbanks asked the appellant what was going on and why he wanted to turn himself in. The appellant, who was distraught and emotional, did not answer right away. Officer Fairbanks asked the appellant if he had done something, and the appellant replied that he "took it too far." The appellant said that he and his girlfriend, the victim, often argued. The appellant maintained that when they argued, the victim "played like" she would commit suicide. The appellant said that a day and a half earlier, he and the victim argued. The appellant said that she "got a knife and told him that she wanted him to do it. . . . [H]e put his hands on the knife and they put the knife to her throat and they cut her throat together." Officer Fairbanks asked if the appellant thought the victim was dead, and the appellant responded affirmatively.

Officer Fairbanks said:

> [T]o be honest, I really wasn't sure if he was telling me the truth or not because no one's ever come up and told me that before, anything like that, but at the same time, you know, I wanted to make sure, I had to find out if it was true or not, so that's why I had dispatch[] send cars over to the address to check and see if anyone's there, and if so, if they're okay. Also, at the same time, at some point during my time with him, I did call Mobile Crisis, which, whenever we have somebody that's either suicidal or homicidal, like if somebody calls and says, "Hey, I'm going

> to take a bunch of pills," you know, if they're a danger to themselves or someone else, we'll call Mobile Crisis, and basically they're kind of an intervention and those people can get them help. So, based on what the [appellant] was telling me, I went ahead and called them just to see if they were familiar with him, if it's you know, something that he's gone through before or not, and they had never dealt with him.

Officer Fairbanks said that Officer Spain arrived as backup, and Officer Fairbanks continued to talk with the appellant:

> Basically, I mean, we were just standing there having a conversation, you know, he's telling us things and we're trying to find out as much as we can to make sure nobody is in danger, you know, and also to try to verify or see if what we were being told is the truth.

Officer Fairbanks said that the appellant gave him the victim's name, telephone number, and address. Officer Fairbanks called dispatch and requested that officers proceed to the victim's address, apartment C-19 at the Brookwood Apartments in Madison, to investigate the appellant's allegations. The appellant told Officer Fairbanks that after the incident, he left the victim's apartment in the victim's car and that while he was driving on the freeway, he threw away the knife he had used on the victim. The appellant said that he parked the victim's car in a nearby alley, locked it, and threw the keys in the alley.

Officer Fairbanks said that the appellant asked to sit down, and he offered to let the appellant sit in the back of the patrol car. Officer Fairbanks handcuffed the appellant and placed him in the patrol car. Officer Fairbanks then drove to an alley off of South Seventh Street and Boscobel where the victim's car was located. Police could not find the keys to the car. While he was in the alley, Officer Fairbanks received a call from police dispatch informing him that the victim's body had been found at the address provided by the appellant.

Metro Officer Archie Spain testified that on November 22, 2005, he heard a radio report that Officer Fairbanks was with a suspect at Seventh Street and Sylvan. Officer Spain said the location was a "high crime area," so he went to the scene as backup. When he arrived, he saw Officer Fairbanks speaking with a black male, the appellant. The appellant said that two or three days earlier, he had accidentally killed his girlfriend with a knife, which he threw out on the interstate. The appellant said he had taken the victim's car, driven around for a while, parked her car in a nearby alley, and thrown the keys away. Officer Spain

said the appellant was "crying like a baby" while he was talking with the officers. Officer Spain stated that he wondered if the appellant were telling the truth or if he were crazy. Officer Spain said the appellant gave accurate directions to where he had parked the victim's Honda in a nearby alley.

Metro Detective Matthew Filter testifed that on November 22, 2005, he and Detective Terrence Bradley heard Officer Fairbanks radio for assistance from a detective. When Detective Filter arrived at the scene, he saw Officer Fairbanks and the appellant standing outside the patrol car. Officer Fairbanks told Detective Filter what the appellant had been saying. During their conversation, the appellant walked up and told Detective Filter that about a day and a half earlier, he and his girlfriend got into an argument. The appellant said that when they argued, the victim acted as if she were going to commit suicide. The appellant stated that on this occasion, the victim took a knife and put it to her throat. The appellant attempted to take the knife from her, and "they cut her throat together." The appellant told Detective Filter that he thought the victim was dead, so he took the knife, got into the victim's car, and fled. The appellant said that he drove around on the interstate, tossed the knife, and later abandoned the car. Detective Filter said police found the victim's car in a nearby alley. Detective Filter said the appellant was very excited and anxious and seemed as if he wanted to talk. Detective Filter said his conversation with the appellant lasted two or three minutes.

Detective James Fuqua of the Metropolitan Police Department testified that he was one of the officers who responded to the victim's apartment at 714 Due West Avenue. Detective Fuqua saw the victim's body on a blanket in the back bedroom of the apartment. Her wrists were bound behind her back with a riveted black leather belt, her ankles were bound together with another black leather belt, and a black coaxial cable looped between the hand and foot bindings, drawing her limbs together behind her back in a "hog-tie" fashion. A shirt was wrapped around her face, and a cord from a cellular telephone charger protruded from under the shirt. Detective Fuqua saw "saturation blood on the neck area and on the shoulder, around the left eye area and around the throat area." Blood was also on the carpet around the victim.

Detective Fuqua said that there was no furniture in the bedroom, only luggage and baggage containing clothing. Mattresses were on the floor in the living room. Men's and women's clothing was scattered around the apartment, and the appellant's business cards were on a counter.

Detective Fuqua left the victim's apartment and went to the north precinct to talk with the appellant. Upon request from Detective Fuqua, the appellant signed a form, consenting to a search of the apartment he shared with the victim.

Detective Fuqua said that police were unable to get fingernail scrapings from the appellant because his fingernails were chewed too short. However, Detective Fuqua noticed that the appellant "had some injuries to his hands, some cuts . . . like a knife cut."

Two box cutters and a pair of scissors were found in the victim's car, but there was no blood on the items. Crime scene officers said that there was damage on the car from the middle of the front door to the back tire, as if the car had sideswiped something or had been sideswiped. Also in the car were papers bearing both the victim's name and the appellant's name, and a man's tie was in the backseat. However, there was no blood in the victim's car.

Dr. Amy R. McMaster, the medical examiner who performed the autopsy of the victim, testified that the thirty-nine-year-old victim was 5'1" tall and weighed 100 pounds. Dr. McMaster said that the victim was wearing a beige sweater with a green shirt underneath, blue jeans, and black boots. A pink or peach shirt was wrapped around her upper neck and lower mouth. Beneath the shirt, a black electrical cord was wrapped around her mouth and neck, securing a white sock which was stuffed in the victim's mouth. Dr. McMaster said that the victim's wrists were bound so tightly with the riveted black leather belt that blood was pushed to either side of the ligature and circular rust stains were left embedded in her skin. Dr. McMaster stated that the victim's body was showing signs of decomposition at the time of the autopsy.

Dr. McMaster said that the black cord around the victim's neck was tied tightly enough to constrict the airway. Additionally, the victim had a number of cuts to her throat; the cuts extended to the tissue beneath the skin but were not deep enough to damage any of the major blood vessels in the neck. Dr. McMaster said that if the victim were still alive when the cuts were made, the cuts would have bled a "great deal." Dr. McMaster stated that there was not much blood at the scene. She opined that

> the explanation for the fact that there wasn't more blood is one of two things; either she died shortly after those cuts were inflicted on her neck, and also because of the pink shirt wrapped tightly around her neck was pressure and it helped to stop the bleeding, so it could be a combination of those two things or one or the other independently.

Dr. McMaster said that the cause of the victim's death was a lack of oxygen, otherwise known as asphyxiation. Dr. McMaster opined that the gag in the victim's mouth made it difficult for her to get air. She explained that the shirt and cable wrapped around her neck impeded her ability to get oxygen and that the bleeding from the cuts on her neck contributed to the lack of oxygen. Dr. McMaster said that estimating the length of time

before death was difficult because she did not know if the injuries contributing to the victim's death occurred at one time. However, Dr. McMaster said that a complete lack of oxygen would generally render a person unconscious in thirty seconds and would cause irreversible brain damage or death within a few minutes. Dr. McMaster estimated that the victim had been dead at least twenty-four hours prior to autopsy. Tests revealed that no drugs or alcohol were in the victim's body when she died.

Agent Charles Hardy, a forensic scientist with the Tennessee Bureau of Investigation Crime Laboratory, testified that the appellant's blood was found on his gray sweatshirt and in several spots on his blue jeans. The victim's blood was on the tongue end of the belt that was wrapped around her wrists, and DNA which did not match the victim or the appellant was on the belt buckle. There was "visible staining" on the buckle, waistband, and "middle back" of the belt that was around the victim's ankles. The blood on that belt was a mixture; the major contributor was the appellant and the minor contributor was the victim. Agent Hardy saw "questionable indentations on the tongue of the belt," which could have been from a person's teeth. Testing revealed the appellant's saliva on the tongue of the belt around the indentations. The cord around the victim's neck, an AC adaptor, was stained with the victim's blood. The appellant's DNA was on the coaxial cable which connected the victim's bound wrists and ankles.

Agent Hardy said that the appellant's sperm was found on swabs taken from the victim's vaginal and anal area. DNA consistent with the appellant was found on clippings taken of the fingernails of the victim's left hand. Blood from both the appellant and the victim was found on the beige sweater the victim was wearing. The victim's DNA was found on the pink shirt that was wrapped around her head; a second contributor's DNA was also found on the pink shirt and the appellant could not be excluded as the minor contributor. The victim's blood was also found on the toe area of the sock which was in her mouth.

The victim's sister, Holly Anderson, testified that she lived in White House, Tennessee, and that the victim moved in with her in March 2005. In mid-September 2005, the victim went to live with another sister, Tina Anderson. In October 2005, after the appellant came to Tennessee, the victim moved into an apartment with the appellant. Holly Anderson said that on November 26, 2005, the family was scheduled to leave for Pennsylvania to attend a memorial service for their recently deceased grandparents. The victim was one of the people slated to drive.

Holly Anderson said that she went to the victim's apartment after her death to gather some of the victim's belongings. Later, she went through the papers she had gathered from the kitchen counter and found a note which was signed by the appellant. The note said,

"Mom, I have done it. I used today. Last night I was kind of fiending and I did it today, 11/20."

Detective Fuqua testified that Holly Anderson gave him the note after she found it. He said that "fiending . . . has something to do with drug usage, possibly wanting drugs . . . needing or wanting drugs."

Singer and Selvin both testified that in April 2004 the victim bought a new, silver Honda Accord for her birthday. Selvin said that the victim paid "[o]ver $500 a month on the car."

Based upon the foregoing proof, the jury found the appellant guilty of second degree murder and theft of property valued between $1,000 and $10,000. On appeal, the appellant contends:

> (1) The trial court erred by denying a motion to suppress statements he made to police.
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> (2) The trial court erred by denying a motion to suppress evidence found in his apartment because consent to search was obtained immediately after he had invoked his right to remain silent.
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> (3) The trial court erred in admitting a photograph of the victim taken prior to her death.
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> (4) The trial court erred in admitting as substantive evidence testimony regarding alleged incidents of threatening conduct by the appellant.
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> (5) The trial court erred in allowing the State to present testimony regarding the victim's plans to attend a memorial service in Pennsylvania for her recently deceased grandparents.
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> (6) The trial court erred in admitting graphic photographs of the victim's face and body.
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> (7) The evidence contained in the record is not sufficient to support the appellant's conviction for theft of property of the value of $1,000 or more, but less than $10,000.

(8) The trial court erred in imposing the maximum sentence for second degree murder.

II. Analysis

A. Suppression Issues

In reviewing a trial court's determinations regarding a suppression hearing, "[q]uestions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). Thus, "a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise." Id. Nevertheless, appellate courts will review the trial court's application of law to the facts purely de novo. See State v. Walton, 41 S.W.3d 75, 81 (Tenn. 2001). Furthermore, the State, as the prevailing party, is "entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence." Odom, 928 S.W.2d at 23. Moreover, we note that "in evaluating the correctness of a trial court's ruling on a pretrial motion to suppress, appellate courts may consider the proof adduced both at the suppression hearing and at trial." State v. Henning, 975 S.W.2d 290, 299 (Tenn. 1998).

1. Statements

Prior to trial, the appellant filed a motion to suppress "all but the initial portion of the statements [he] made to officers." At the suppression hearing, Officer Fairbanks testified that at around 9:30 p.m. on November 22, 2005, the appellant approached him from South Seventh Street with his hands raised in surrender. Officer Fairbanks summoned backup officers to the scene and got out of his police car. The appellant told Officer Fairbanks that he wanted to turn himself in. The appellant was emotional and nervous. Officer Fairbanks asked the appellant if he had done something to warrant turning himself in, and the appellant replied that "he took it too far." After Officer Fairbanks asked the appellant what he had done, the appellant said that he and his girlfriend, the victim, had argued and she began "playing like" she would commit suicide. She grabbed a kitchen knife, put it to her throat, and told the appellant that she wanted him to "do it." He put his hand on the knife, and the two of them cut her throat. Officer Fairbanks asked the appellant if he thought the victim was dead, and the appellant said yes. Officer Fairbanks asked the appellant for the victim's name, telephone number, and address. Upon receiving the information, Officer Fairbanks called dispatch and requested that officers in that area investigate the appellant's claims.

Officer Fairbanks said that Officer Spain came to the scene. Officer Spain asked the appellant how he got to that location. The appellant told the officer that after he cut the victim's throat, he took her car and drove around, tossing the knife out on the freeway. He said he parked the car in a nearby alley and threw the keys in the alley.

Officer Fairbanks stated that Detectives Matthew Filter and Terrance Bradley also responded as backup. Officer Fairbanks said that the appellant was not handcuffed at the time the detectives arrived. After they arrived, the appellant told Officer Fairbanks that he wanted to sit down. Officer Fairbanks told the appellant that he could sit in the patrol car but that he would have to be handcuffed first. Officer Fairbanks then handcuffed the appellant and put him in the back of the patrol car. The detectives told Officer Fairbanks that he should not ask any questions of the appellant after he was handcuffed, and Officer Fairbanks complied with the detectives' instruction. Officer Fairbanks maintained that he never told the appellant that he was under arrest or made him think he had been charged prior to handcuffing him. Officer Fairbanks said:

> I went ahead and put him in cuffs based on the seriousness of what he had told me he had done and I didn't know if he had committed a crime at that point or not, he was telling me that he did, so I just made the decision to go ahead and have him detained until we could figure out, especially since the crime he was confessing to was homicide.

Officer Fairbanks said that prior to being handcuffed, the appellant offered several times to show the officers where the victim's car was parked. Officer Fairbanks maintained that after the appellant was handcuffed, the appellant gave him directions to the victim's car but that the directions were not given in response to questioning. Specifically, Officer Fairbanks stated:

> After I placed him in handcuffs and put him in my police car, [the detectives] told me don't ask him anything else.
>
> . . . .
>
> I don't remember exactly how we began talking about the car. He had told us several times he would show us where it was, and at some point, you know, when I started to drive or go, he was telling me where to go to find the car, so I just followed his direction.

Officer Fairbanks acknowledged that neither he nor any of the officers at the scene advised the appellant of his Miranda rights.

Detective Matthew Filter testified that on November 22, 2005, he and Detective Bradley responded to Officer Fairbanks' request to respond to South Seventh Street and Sylvan. Officer Fairbanks asked for assistance because the appellant said he had killed his girlfriend. Detective Filter said that when they arrived at the scene, the appellant and Officer Fairbanks were standing outside Officer Fairbanks' car. Officer Fairbanks related the information he had received from the appellant and said he had called for police to investigate the appellant's claims and check on the welfare of the victim. While Detective Filter was speaking with Officer Fairbanks, the appellant "made several comments, just voluntary statements about what had transpired over about the last day and a half." The appellant said that he and the victim had argued and that when they argued she would act like she would commit suicide. On this occasion, she had taken a knife and put it to her throat, acting like she would cut her throat. The appellant told Detective Filter that when he attempted to take the knife away, "they cut her throat" and that he believed she was dead. Afterward, he took the victim's car and threw away the knife while driving on the freeway. Detective Filter said that the appellant was "rather anxious" and "very cooperative."

The following colloquy occurred regarding when the appellant was handcuffed:

> [State:] And at that point when he was saying those things to you and you came to the scene, was he in cuffs at that point?
>
> [Detective Filter:] I don't recall if he was or not.
>
> [State:] Do you – do you recall him being placed in cuffs?
>
> [Detective Filter:] He was placed in cuffs. At one point, shortly before we left that intersection, he was placed in cuffs by Officer Fairbanks and placed in the back seat of Officer Fairbanks' car.

Detective Filter said that he advised Officer Fairbanks not to question the appellant any further after handcuffing him and that no one asked the appellant any questions after he was handcuffed.

Detective Filter stated that prior to being handcuffed, the appellant mentioned that he had abandoned the victim's car in an alley. However, he did not direct the officers to the alley where he had abandoned the victim's car until after he was handcuffed. Detective Filter explained, "[I]f my report says that he was handcuffed when I arrived, then he was handcuffed when I arrived." However, he maintained that "[t]oday as I sit here, I remember, I believe Officer Fairbanks put him in handcuffs after I arrived on the scene." Detective Filter said that he did not recall asking the appellant any questions; the appellant volunteered information. Detective Filter said that the detectives were at the scene when Officer Archie Spain arrived.

Officer Archie Spain testified that on November 22, 2005, he heard Officer Fairbanks inform dispatch that he was speaking with someone in a known high crime area. Officer Spain was in the area, so he went to assist Officer Fairbanks. Officer Spain said that when he arrived, the appellant "was standing there unhandcuffed just crying like a baby." The appellant told him that he thought he had killed his girlfriend. The appellant said that after he cut the victim's throat, he took her car and threw the knife out on the interstate. One of the officers asked the appellant when the incident happened and the appellant responded that it happened two or three days earlier and that he parked her car in a nearby alley. Officer Spain recalled that "around this time, I don't know exactly when, Officer Fairbanks pulled the handcuffs out of his wallet or pistol belt and advised that he was going to handcuff the [appellant] for his safety and Officer Fairbank[s'] safety. The [appellant] was nice and cooperative."

Officer Spain stated that no questions were asked of the appellant after he was handcuffed because Officer Fairbanks put him in the patrol car at that point. Officer Spain said that there was no "aggressiv[e] interrogat[ion]" of the appellant. He said that the appellant "was crying and saying that he had to get this off of his chest so he was volunteering it."

After the appellant was placed in the patrol car, Officer Spain got into his car and followed Officer Fairbanks to the nearby alley where the victim's car was located. Officer Spain said that Detectives Filter and Bradley did not arrive while he was there. He believed that the detectives arrived as he was leaving the alley.

The trial court found that during the "first set of statements," given before the appellant was handcuffed and placed in the police car, the appellant was not in custody. The court found that during the "second set," there was no questioning involved; the appellant heard Officer Fairbanks tell the detectives what the appellant had said and then the appellant "interjected himself into that conversation." The court stated that Officer Fairbanks

essentially testified that he did not ask the appellant any questions except "preliminary investigative matters that . . . definitely aren't covered under Miranda."

On appeal, the appellant contends that "all but the initial portions of the statements he made to officers occurred while he was subjected to custodial interrogation without benefit of the warnings required by Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)." He maintains that "the trial court erred in ruling that all statements he made prior to being handcuffed were admissible. . . . [A]part from his initial statements to Officer Fairbanks that he participated in cutting his girlfriend and giving the address where she was found, his statements were the product of custodial interrogation without benefit of Miranda warnings . . . ." Specifically, the appellant argues:

> [T]he proof at the suppression hearing and at trial established that the [appellant] approached Officer Fairbanks with his hands raised as if he were surrendering to police. Officer Fairbanks immediately asked enough questions to ascertain that according to the [appellant], the victim's throat had been cut, and that she was at a specific address given to him by the [appellant]. Upon receiving this information, Officer Fairbanks clearly would not have allowed the [appellant] to walk away. The [appellant] submits that at that point, he was 'in custody' for purposes of Miranda, and should have been advised of his Miranda rights before any further questions were asked. Subsequent statements made by the [appellant] in response to police questioning that he thought his girlfriend was dead, that he disposed of the knife on the freeway, and statements that directed police to the location of the car, should not have been admitted. The proof is undisputed that the [appellant] had not been advised of his Miranda rights when these statements were made.

The State contends that "the court properly found the [appellant] was not in custody or under arrest when he voluntarily approached the police and told them that he had murdered his girlfriend."

Generally, the Fifth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution provide a privilege against self-incrimination to those accused of criminal activity, making an inquiry into the voluntariness of a confession necessary. See State v. Callahan, 979 S.W.2d 577, 581 (Tenn. 1998). As our supreme court has explained:

> In Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694 (1966), the United States Supreme Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." The procedural safeguards must include warnings prior to any custodial questioning that an accused has the right to remain silent, that any statement he makes may be used against him, and that he has the right to an attorney.

State v. Blackstock, 19 S.W.3d 200, 207 (Tenn. 2000). The entitlement to Miranda protections is limited to situations involving custodial interrogation or its functional equivalent. Walton, 41 S.W.3d at 82. A trial judge's findings of fact at a motion to suppress hearing are accorded the weight of a jury verdict. See State v. Tate, 615 S.W.2d 161, 162 (Tenn. Crim. App. 1981). Accordingly, the trial court's findings of fact are binding upon this court if the decision is supported by a preponderance of the evidence. Odom, 928 S.W.2d at 22-23.

In determining whether a suspect is in custody for Miranda purposes, we must consider "whether, under the totality of the circumstances, a reasonable person in the suspect's position would consider himself or herself deprived of freedom of movement to a degree associated with a formal arrest." State v. Anderson, 937 S.W.2d 851, 855 (Tenn. 1996). The analysis is very fact-specific. Id. Certain factors are relevant to our inquiry, including but not limited to the following:

> the time and location of the interrogation; the duration and character of the questioning; the officer's tone of voice and general demeanor; the suspect's method of transportation to the place of questioning; the number of police officers present; any limitation on movement or other form of restraint imposed on the suspect during the interrogation; any interactions between the officer and the suspect, including the words spoken by the officer to the suspect, and the suspect's verbal or nonverbal responses; the extent to which the suspect is confronted with the law enforcement officer's suspicions of guilt or evidence of guilt; and finally, the extent to which the suspect is made aware that he or she is free to refrain from answering questions or to end the interview at will.

Id. We note that whether a suspect is in custody is determined by an objective test. State v. Bush, 942 S.W.2d 489, 499 (Tenn. 1997).

The record before us reflects that the appellant flagged down Officer Fairbanks, walked toward the officer's patrol car with his hands raised in surrender, and said he wanted to turn himself in because he had taken a situation "too far" and thought he had killed his girlfriend. Officer Fairbanks testified that the interaction was cordial and conversational. The two men stood beside the police car during the conversation, and, until the point when the appellant was handcuffed and placed in the police car, the appellant was unrestrained. Officer Fairbanks never told the appellant that he could not leave, and the appellant exhibited no desire to do so. Officer Fairbanks asked questions of the appellant to discern what he was talking about, noting that he initially believed the appellant had mental issues. For most of the contested conversation, the only people present were the appellant and Officer Fairbanks. Later, they were joined by Officer Spain. The trial court found that the appellant was not in custody when he spoke with Officer Fairbanks and Officer Spain prior to the detectives' arrival. However, the trial court found that by the time the detectives arrived, the appellant was in handcuffs and should have been Mirandized before further interrogation. The court stated that any statements the appellant made in the police vehicle, directing officers to the victim's car, were inadmissible because the statements were made in response to conversations with Officer Fairbanks. Regardless, the trial court found that the appellant had earlier described the location of the victim's car and that, therefore, Officers Fairbanks and Spain had a "good idea where it was." In analyzing the Anderson factors, we conclude that the evidence does not preponderate against the trial court's ruling. Accordingly, the trial court properly found that the appellant's statements to Officer Fairbanks and Officer Spain were admissible.

2. Consent to Search

Next, the appellant contends that "[t]he trial court erred in denying the [appellant's] motion to suppress evidence obtained pursuant to an illegal search because the [appellant's] consent to the search was obtained immediately after he had invoked his right to remain silent." At the suppression hearing, Detective James Fuqua testified that he attempted to interview the appellant after he was taken to the North station. At about 11:15 p.m., Detective Fuqua advised the appellant of his Miranda rights. Detective Fuqua stated that the appellant "told me that he didn't feel like talking right then, but he would talk to us later." Detective Fuqua said that the appellant appeared "relaxed, like he was tired." Detective Fuqua said that he did not pressure the appellant into speaking with him. A few minutes later, at around 11:25 p.m., after coming in and out of the room once or twice, Detective Fuqua asked the appellant for consent to search his apartment. The appellant agreed and signed a consent to search form. Detective Fuqua said that the appellant had a chance to read

the form before he signed it. Detective Fuqua stated that the form advised the appellant that he had the right to refuse consent to search. The appellant never indicated that he could not read the form that was handed to him, and he told Detective Fuqua that he had attended two years of college. The next day, Detective Fuqua attempted to interview the appellant again. The appellant said that he was sorry he had brought the detective back and that he wanted to talk to an attorney.

The trial court found that the appellant was in custody at the time he signed the consent to search form, that he had been advised of his Miranda rights, and that he had invoked his right to remain silent. The court noted that approximately fifteen minutes after the appellant invoked his right to remain silent, Detective Fuqua presented to the appellant a consent to search form. The appellant signed the form after Detective Fuqua explained that he wanted permission to look around the appellant's apartment. The court noted that

> if, as is the case here, the evidence being challenged is non-testimonial, then the constitutional safeguards against self-incrimination do not apply. Simply put, any evidence derived from a consent to search, if knowingly and voluntarily given, is not tainted by a fifth amendment or Article I, Section 9 violation because it is not an incriminating statement.

The court found that "[t]here is little evidence in this case to suggest that [the appellant's] free will was over borne or his ability to make a self-determined choice was critically impaired." The court noted that the appellant had steadfastly rebuked police efforts to get him to waive his right to remain silent only minutes prior, indicating that the appellant was not intimidated by the "inherent[] coercive effect" of the police interrogation room. The court noted that the interview lasted approximately fifteen minutes and that the appellant was alone in the interview room for most of that time. The court said that an audio recording of the interview reflected that the police did not use threatening language or tones or manipulative tactics. The appellant did not protest signing the consent to search form. Accordingly, the court found that the appellant "knowingly and voluntarily consented to the search of the subject premises."

On appeal, the appellant argues that the evidence demonstrates that the appellant invoked his right to remain silent; therefore, Detective Fuqua should have "scrupulously honored" the appellant's right to remain silent and stopped speaking with the appellant. The appellant maintains that the trial court's finding that the Fifth Amendment privilege against self-incrimination did not apply because the written consent to search was non-testimonial "would allow police officers to continue to badger a suspect who has invoked his right to remain silent, as long as the product of the badgering is a written consent to search." The

appellant maintains that once he invoked his Fifth Amendment right to remain silent, police were obligated to cease questioning him and that by asking for his consent to search, his rights were violated. Therefore, the appellant contends that the evidence obtained during the search, such as the photographs of bloody washcloths in the bathroom, should have been suppressed.

As we earlier noted, both the United States and Tennessee Constitutions provide that no individual should be compelled to give evidence against himself. The Supreme Court in the Miranda decision generated procedural safeguards against a violation of the right against self-incrimination. See U.S. Const. Amend. V; Tenn. Const. art. I, § 9; State v. Crump, 834 S.W.2d 265, 268 (Tenn. 1992). However, "the Fifth amendment applies only to testimonial or communicative evidence, and as such, all non-testimonial evidence would seem to fall outside the scope of the 'fruit of the poisonous tree' doctrine as applied to the Fifth Amendment." State v. Walton, 41 S.W.3d 75, 87 (Tenn. 2001) (citations omitted).

Generally, "[a] consent to a search is not the type of incriminating statement toward which the fifth amendment is directed [because i]t is not in itself 'evidence of a testimonial or communicative nature.'" United States v. Lemon, 550 F.2d 467, 472 (9th Cir. 1977) (quoting Schmerber v. California, 384 U.S. 757, 761 (1966)). Therefore, while "the Fifth Amendment's protection against self-incriminating statements may limit further interrogation once a person in custody invokes his right to counsel [or his right to remain silent], . . . there is no similar prohibition on securing a voluntary consent to search for physical evidence." United States v. Knight, 58 F.3d 393, 397 (8th Cir. 1995) (citing Cody v. Solem, 755 F.2d 1323, 1330 (8th Cir. 1985)). This is because "Miranda has to do only with police conduct reasonably likely to elicit an incriminating response, while requests made to a defendant by one seeking consent to search . . . do not constitute further questioning, or the functional equivalent of further questioning." Wayne R. LaFave, Search and Seizure, §8.2(k) (4th ed. 2004) (footnotes and internal quotations omitted). "Miranda warnings are not constitutional rights in themselves, but are merely standards designed to safeguard the Fifth Amendment privilege against self-incrimination." Smith v. Wainwright, 581 F.2d 1149, 1152 (5th Cir. 1978). However, a consent to search, in and of itself, is not evidence which tends incriminate; a search pursuant to consent may disclose incriminating evidence, but that "evidence is real and physical, not testimonial." Cody, 755 F.2d at 1330. Accordingly, we conclude that the trial court did not err in finding that the appellant's consent to search was non-testimonial and was therefore not subject to exclusion based upon a Fifth Amendment violation. See State v. Kyger, 787 S.W.2d 13, 24 (Tenn. Crim. App. 1989).

B. Evidentiary Issues

1. Admission of Photographs

The appellant contends that the trial court erred in admitting certain photographs of the victim. The appellant first complains that the trial court erred in admitting a photograph which was taken of the victim while she was alive. At trial, the State sought to introduce the photograph through the victim's sister, Savannah Singer. The appellant objected, arguing that the photograph was not relevant and would only "stir [the] sympathy" of the jury. The State argued that prior case law approved the use of a photograph. The State further argued that the photograph showed the marked difference between the victim's appearance "at the time of her death versus the way she actually looks in real life, and it shows how petite she is, which is a very important issue in this particular case, if you look at the size of the [appellant]." The trial court overruled the appellant's objection, provided that Singer testified the photograph depicted the victim's appearance the last time she saw her. The court determined that the probative value was not outweighed by the prejudicial effect. Singer testified that the photograph depicted the victim's appearance when Singer last saw her, and the photograph was admitted.

On appeal, the appellant maintains that the photograph of the victim while alive was irrelevant to any issue at trial and its purpose was to stir the sympathy of the jury. In the alternative, the appellant argues that if the photograph were relevant, it should have been excluded because its probative value was substantially outweighed by the danger of unfair prejudice. The State argues that the photograph was relevant to "establish the *corpus delecti*, including the identity of the victim" and was properly admitted.

The decision regarding the admissibility of photographs lies within the sound discretion of the trial court, and that ruling will not be overturned on appeal absent a showing of an abuse of that discretion. State v. Banks, 564 S.W.2d 947, 949 (Tenn. 1978). In order to be admitted as evidence, a photograph must be relevant to an issue at trial. Tenn. R. Evid. 402; State v. Braden, 867 S.W.2d 750, 758 (Tenn. Crim. App. 1993). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. However, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Tenn. R. Evid. 403. "'If relevant, the photograph is not rendered inadmissible because the subject portrayed could be described by words; . . . the photograph would be cumulative; . . . or [the photograph] is gruesome or for some other reason is likely to inflame the jury.'" Collins v. State, 506 S.W.2d 179, 185 (Tenn. Crim. App. 1973) (quoting 3 Wharton's Criminal Evidence § 637 (13th ed.)). Generally, "photographs of the corpse are admissible in murder prosecutions if they are relevant to the issues on trial, notwithstanding their gruesome and horrifying character." Banks, 564 S.W.2d at 950-51. Moreover, photographs can be relevant if they aid the testimony of the medical examiner. See State v. Bush, 942 S.W.2d 489, 515 (Tenn. 1997) (appendix). However, the

probative value of the evidence must be weighed against any unfair prejudice the defendant will suffer in admitting the evidence. Banks, 564 S.W.2d at 951.

In State v. Nesbit, 978 S.W.2d 872, 902 (Tenn. 1998) (appendix), our supreme court approved of the use during trial of a photograph taken while the victim was alive to establish the corpus delecti of the crime and to prove that the "person killed was the same person named in the indictment." Accordingly, we conclude that the photograph of the victim was relevant at trial. Therefore, the trial court did not err in admitting the photograph of the victim.

Prior to trial, the appellant filed a motion in limine to exclude photographs of the victim's face and hand. He also moved to "crop" a photograph of the victim's face. During the hearing on the motion, the appellant objected to three photographs. The first photograph, exhibit 25(c), was a close-up photograph of the victim's hands and wrists. The photograph showed that the rivets on the belt binding her wrists had left indentations embedded in her skin. The photograph also showed indentations where the belt had been wrapped tightly around her wrists and hands. The appellant argued that there were other, less prejudicial photographs depicting the hands. He further argued that because the photograph showed some decay on the victim's hands, the photograph was prejudicial. The court noted that the photograph demonstrated how tightly the victim's hands had been bound. The court found that because of the appellant's claim that the victim had been hurt accidentally, the photographs were relevant to show the deliberateness with which her hands had been tied. The trial court found that the photograph was not overly gruesome or prejudicial. The trial court also found that the probative value of the photograph was not outweighed by its prejudicial effect. Therefore, the court found the photograph admissible.

The appellant also objected to exhibit 26, a close-up photograph of the victim's face. The photograph depicted the cuts in the victim's throat as well as the deep indentations in her skin where the gag had been tied. The appellant told the court, "I am not arguing relevance . . . what I'm arguing is that there is just a much cleaner, less graphic, a less likely to inflame them way of doing it." The appellant argued that the injuries could be described by the medical examiner or a diagram of the wounds could be submitted to the jury. The court responded, "I think when you first got into this case and you heard about the injuries to the neck you thought they were kind of superficial injuries and you didn't realize just how deep and significant they were until you got the photographs." The court observed that the extent of the victim's injuries as depicted by the photographs was relevant to show the appellant's intent and the lack of accident. The court said that although the photograph might be disturbing, the probative value of the photograph was not outweighed by its prejudicial effect. Thus, the court found that the photograph was admissible. The State volunteered to

crop the photograph below the victim's eyes to reduce any prejudicial effect. The court agreed that cropping the photograph would mitigate any "potential impact."

Finally, the appellant objected to exhibit 27, a close-up photograph of the victim's face. The photograph was taken before the gag was removed from the victim's mouth and showed the shirt and electrical cord tied around the victim's neck. Defense counsel said, "I don't see any probative value of the photographs." The court ruled that the photograph was admissible, noting that it showed all of the layers of binding on the victim's face and "that this arguably was not just some kind of after the fact type of thing, it goes very strongly to premeditation and intent." The State agreed to crop this photograph "as long as it will show the distinctive blanching mark . . . from the bridge of the nose down." At trial, the medical examiner, Dr. McMaster, utilized the photographs during her testimony.

On appeal, the appellant challenges the admission of the photographs, contending that the photographs were irrelevant or were overly prejudicial. Upon our review of the record, we agree with the trial court's findings. The appellant told police that at the victim's urging, he held the knife with her and that together they accidentally cut her throat. He maintained that afterward he left the residence, taking the knife with him. The photographs clearly belie the appellant's version of events. Exhibit 25(c), the photograph of the indentations on the victim's hands caused by the rivets on the belt, shows that the victim's hands were tightly bound. Exhibit 26, the photograph of the indentations in the victim's face, likewise shows how tightly and deliberately she was gagged and also shows several slices to the victim's throat. The depth and number of the cuts suggests a lack of accident. Exhibit 27, the photograph of the gagged victim, shows the many layers of binding on the victim's face and neck, once again demonstrating a lack of accident. The photographs are not overly gruesome. Therefore, we, like the trial court, conclude that the probative value of the photographs was not outweighed by any prejudicial effect. Accordingly, we conclude that the trial court did not err in finding the photographs admissible.

2. Prior Threats

Prior to trial, the appellant filed a "Motion to Exclude Prior Bad Acts" pursuant to Rule 404(b) of the Tennessee Rules of Evidence. Specifically, the appellant challenged the testimony of Singer and Selvin regarding the threatening messages the appellant left on the victim's voice mail. At the pretrial hearing on the motion and at trial, Selvin testified that in February 2005, she saw the victim and the appellant sitting in the victim's car which was parked in Selvin's driveway and that she saw an argument between the victim and the appellant. Selvin said that after the argument, the victim took the appellant to the bus station. She returned, crying and distressed, and shortly thereafter left for a week-long visit to Montana.

Singer and Selvin said that in February 2005, after the victim's return to California from Montana, they heard the threatening messages the appellant left on the victim's voice mail for the victim and her youngest son. Singer testified that because of the threatening messages, the victim left California and went to stay with her sisters in Tennessee.

At the conclusion of the hearing, the trial court found the testimony was admissible. At trial, Singer and Selvin testified in accordance with their motion hearing testimony. After each witness testified, the trial court instructed the jury that the prior acts testimony was to be considered "only on the issue of [the appellant's] intent and motive to commit the offenses for which he is on trial . . . [and not] to show that [the appellant] had a propensity to act in conformity with his conduct on the occasions that he left the voice mails."

Specifically, on appeal, the appellant contends that the testimony should have been excluded pursuant to Tennessee Rule of Evidence 404(b) because identity was not a material issue in the case and that the contested testimony "does not establish the [appellant's] motive, since neither incident offers any insight or explanation as to *why* the [appellant] would wish to kill the victim."[2] The appellant contends that the contested testimony did not establish intent but instead demonstrated his propensity to commit the crime. Additionally, the appellant contends that the danger of unfair prejudice outweighed the probative value of the testimony.

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[2] Tennessee Rule of Evidence 404 provides:

> (b) Other Crimes, Wrongs, or Acts. - Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:
>
> (1) The court upon request must hold a hearing outside the jury's presence;
>
> (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
>
> (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
>
> (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

A trial court's decision regarding the admission of Rule 404(b) evidence will be reviewed under an abuse of discretion standard; however, "the decision of the trial court should be afforded no deference unless there has been substantial compliance with the procedural requirements of the Rule." State v. DuBose, 953 S.W.2d 649, 652 (Tenn. 1997).

Generally, "[o]nly in an exceptional case will another crime, wrong, or bad act be relevant to an issue other than the accused's character. Such exceptional cases include identity, intent, motive, opportunity, or rebuttal of mistake or accident." State v. Luellen, 867 S.W.2d 736, 740 (Tenn. Crim. App. 1992). In making its decision regarding the admissibility of the testimony, the trial court must first determine if the offered testimony is relevant to prove something other than the appellant's character. In the instant case, the State argued that both prior incidents related to the lack of accident.

As we stated earlier, the prior acts testimony of Singer and Selvin reflected that after an argument, the victim left the appellant and went to Montana. When she returned to California, the appellant left threatening messages on her voice mail, indicating he knew she was back in town. In response to the messages, the victim left California for Tennessee. The proof at trial reflected that the victim's death occurred shortly before she was scheduled to go to Pennsylvania for an event to which the appellant was not invited.

Unquestionably, a trial court may admit evidence of prior acts by an accused against a victim to show intent and motive. Indeed, this court has previously stated, "The relations existing between the victim and the defendant prior to the commission of the crime are relevant." State v. Glebock, 616 S.W.2d 897, 905-06 (Tenn. Crim. App. 1981). In this case, "[t]hese relations indicate hostility toward the victim and a settled purpose to harm or injure [the victim]." Id. Moreover, as we earlier stated, prior acts evidence is appropriate to rebut a claim of mistake or accident if such a claim is asserted as a defense. State v. McCary, 922 S.W.2d 511, 514 (Tenn. 1996).

The appellant maintains that he "did not assert accident or mistake as a defense, so there was nothing to rebut on this issue." We disagree. In cross-examining Officer Spain, defense counsel repeatedly asked if the appellant asserted that he killed the victim by accident. Further, during closing argument, defense counsel argued that the victim's death occurred because the appellant "took it too far" and that "something . . . went out of control" and "got out of hand."[3] In other words, the appellant's defense was that he did not intend to cause the victim's death; it was just the result of an unfortunate series of events. Therefore, contrary to the appellant's assertion on appeal, his theory of defense raised the issue of accident and lack of intent. As the appellant's claims of accident and lack of intent were the

[3] We note that opening statements were not transcribed and included in the record on appeal.

crux of the case, the probative value of the evidence was great and was not outweighed by any unfair prejudice. From our review of the record, we conclude the trial court did not err in allowing the State to adduce proof, namely the voice mails, to rebut the appellant's claims of accident and that his actions were unintentional.

Regarding the incident in Selvin's driveway, the trial court stated that "the situation is relevant to give the context of the relationship that was existing between these two people and her frustration with not being able to get away from him." Additionally, the trial court gave the following curative instruction after Selvin's testimony:

> I instruct you that you cannot consider this evidence to establish premeditation or intent as it relates to the first degree murder charge for which [the appellant] is now on trial. You can only consider this testimony to place in context the nature of the parties' relationship at the time of the incident at Ms. Selvin's home and to explain the subsequent actions of [the victim].

In State v. Gilliland, 22 S.W.3d 266, 272 (Tenn. 2000), our supreme court stated that

> when the state seeks to offer evidence of other crimes, wrongs, or acts that is relevant only to provide a contextual background for the case, the state must establish, the trial court must find, that (1) the absence of the evidence would create a chronological or conceptual void in the state's presentation of its case; (2) the void created by the absence of the evidence would likely result in significant jury confusion as to the material issues or evidence in the case; and (3) the probative value of the evidence is not outweighed by the danger of unfair prejudice.

Turning to the instant case, we conclude that the incident in Selvin's driveway was relevant to the issues at trial. The major issue in this case was whether the appellant intentionally or accidentally killed the victim. The driveway incident demonstrated their tumultuous relationship. Moreover, the absence of evidence about the driveway incident would have created a chronological or conceptual void in the State's case regarding the timeline of and the reason for the victim's move to Tennessee.

3. Testimony About Grandparents' Memorial Service

The appellant argues that the trial court erred in allowing testimony that at the time of the victim's death, she was planning to attend a memorial service in Pennsylvania for her

grandparents. The appellant maintains that the testimony was not relevant to any issue at trial, specifically arguing that "[n]othing in the record suggests that the victim's death was in any way related to the memorial service in Pennsylvania." In the alternative, the appellant contends that even if the evidence was relevant, it was designed to appeal to the jury's sympathy and was unduly prejudicial.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401; see also State v. Kennedy, 7 S.W.3d 58, 68 (Tenn. Crim. App. 1999). Tennessee Rule of Evidence 402 provides that "[a]ll relevant evidence is admissible except as [otherwise] provided . . . . Evidence which is not relevant is not admissible." However, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Tenn. R. Evid. 403. It is within the trial court's discretion to determine whether the proffered evidence is relevant; thus, we will not overturn the trial court's decision absent an abuse of discretion. State v. Forbes, 918 S.W.2d 431, 449 (Tenn. Crim. App. 1995).

On appeal, the State argues that the testimony about the victim's plans to attend her grandparents' memorial service and her desire to attend the services indicates that she was not suicidal in refutation of the appellant's statement to police that the victim put a knife to her throat as if she were suicidal. We agree that the contested evidence is probative to refute the appellant's contention regarding the victim's state of mind. See State v. Wilson, 164 S.W.3d 355, 362-63 (Tenn. Crim. App. 2003).

C. Sufficiency of the Evidence

The appellant contends that there was insufficient evidence adduced at trial to support his conviction for theft of property valued at $1,000 or more but less than $10,000, arguing that the State failed to establish the value of the victim's car. On appeal, a jury conviction removes the presumption of the appellant's innocence and replaces it with one of guilt, so that the appellant carries the burden of demonstrating to this court why the evidence will not support the jury's findings. See State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The appellant must establish that no reasonable trier of fact could have found the essential elements of the offense beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); Tenn. R. App. P. 13(e).

Accordingly, on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. See State v.

Williams, 657 S.W.2d 405, 410 (Tenn. 1983). In other words, questions concerning the credibility of witnesses and the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, and not the appellate courts. See State v. Pruett, 788 S.W.2d 559, 561 (Tenn. 1990).

A theft of property occurs when someone, with the intent to deprive the owner of property, knowingly obtains or exercises control over the property without the owner's effective consent. Tenn. Code Ann. § 39-14-103 (2003). A theft is "[a] Class D felony if the value of the property or services obtained is one thousand dollars ($1,000) or more but less than ten thousand dollars ($10,000)." Tenn. Code Ann. § 39-14-105(6) (2003).

In the instant case, Savannah Singer testified that the victim bought a new, silver, four-door, Honda Accord for her birthday in April 2004. Hillary Selvin testified that the victim lived with her and Bonnie Anderson when she bought the car. Selvin said that the victim "was paying over $500 a month" for the car. The appellant told police that after he cut the victim's throat, he took her car and drove around for a day or two before parking the car and throwing away the keys. The jury, as the trier of fact, found the appellant guilty of theft of property valued at $1,000 or more but less than $10,000. In denying the appellant's motion for new trial, the trial court noted that "I think the jury is allowed to use their common sense in terms of establishing a value and certainly there is nothing that flies in the face of logic that they found the car having the value of $1,000 when it was less than a year old and purchased brand new." See State v. Jeremy Grooms, No. 03C01-9409-CR-00321, 1995 WL 238606, at *2 (Tenn. Crim. App. at Knoxville, Apr. 25, 1995). We agree.

D. Sentencing

Finally, the appellant contends that the trial court erred in imposing the maximum sentence of twenty-five years for his conviction of second degree murder.[4] Appellate review of the length, range or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d) (2006). In conducting its de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; (7) any statement by the appellant in his own behalf; and (8) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210 (2006); see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The

[4] The appellant does not challenge the sentence imposed for his theft conviction.

burden is on the appellant to demonstrate the impropriety of his sentence. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. Moreover, if the record reveals that the trial court adequately considered sentencing principles and all relevant facts and circumstances, this court will accord the trial court's determinations a presumption of correctness. Id. at (d); Ashby, 823 S.W.2d at 169.

In determining a specific sentence within a range of punishment, the trial court should consider, but is not bound by, the following advisory guidelines:

> (1) The minimum sentence within the range of punishment is the sentence that should be imposed, because the general assembly set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony classifications; and
>
> (2) The sentence length within the range should be adjusted, as appropriate, by the presence or absence of mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114.

Tenn. Code Ann. § 40-35-210(c).

Although the trial court should also consider enhancement and mitigating factors, the statutory enhancement factors are advisory only. See Tenn. Code Ann. § 40-35-114 (2006); State v. Carter, 254 S.W.3d 335, 343-44 (Tenn. 2008). We note that "a trial court's weighing of various mitigating and enhancement factors [is] left to the trial court's sound discretion." Carter, 254 S.W.3d at 345. In other words, "the trial court is free to select any sentence within the applicable range so long as the length of the sentence is 'consistent with the purposes and principles of [the Sentencing Act].'" Id. at 343. "[A]ppellate courts are therefore left with a narrower set of circumstances in which they might find that a trial court has abused its discretion in setting the length of a defendant's sentence . . . [and are] bound by a trial court's decision as to the length of the sentence imposed so long as it is imposed in a manner consistent with the purposes and principles set out in sections -102 and -103 of the Sentencing Act." Id. at 345-46.

At the sentencing hearing, the victim's sisters testified that the victim was afraid of the appellant throughout their relationship and that she called him "the devil." The victim told Singer that the appellant had disclosed to her that he had previously murdered someone, and the victim feared that he would kill her. Singer said that the victim tried to evade the appellant by moving to Tennessee, but the appellant's mother bought him a one-way bus ticket to Tennessee and he followed the victim. Singer said the victim had been a fun-loving, vibrant person.

The appellant's mother, Bernadine Lewis, testified that the appellant's family was "tight-knit" and that the appellant had been a good student and athlete. She said that she and the appellant's father were divorced and that the appellant had lived with both of them from time to time because he did not have a residence of his own. She said that the appellant had worked numerous jobs "in food service" and for a Chrysler dealership in Nashville. Lewis stated that as an adult, the appellant became involved with drugs. She said that he attempted drug rehabilitation at least twice, but his attempts were unsuccessful. Lewis recalled that the appellant had previously enlisted in the Navy but that he was sent home after six weeks for failing a drug test. Lewis stated that the appellant needed drug treatment; however, she questioned his ability to complete treatment.

Lewis maintained that the instant offenses were "way out of [the appellant's] character," but she acknowledged that the appellant had previously stolen from his father's family. Lewis said that the appellant had a four-year-old daughter who lived with her mother in Australia. Lewis acknowledged that the appellant did not pay child support.

Michelle Sydnor, the appellant's sister, testified that the appellant was not a violent person. She said that the appellant had given money to his daughter and that she paid monthly child support for him. She stated although the appellant worked several jobs in the restaurant industry before he began "pretty heavily using drugs" in 2003, he did not have a steady work history thereafter. She said that after the appellant began using drugs, he stole from different stores, including the store where the victim worked. She said that the appellant had two uncles who had been "hooked" on drugs, one of whom was killed trying to buy drugs.

At the conclusion of the sentencing hearing, the trial court noted that the appellant had been found guilty of a Class A felony. See Tenn. Code Ann. § 39-13-210(c). The trial court found that the appellant was a standard, Range I offender. See Tenn. Code Ann. § 40-35-105(a) and (b). The court then imposed the maximum sentence of twenty-five years. See Tenn. Code Ann. § 40-35-112(a)(1) (providing that a Range I offender guilty of a Class A felony is subject to a sentence of not less than fifteen years nor more than twenty-five years).

On appeal, the appellant contends that his sentence for second degree murder is excessive. Specifically, he argues that the trial court erred in finding that he treated the victim with exceptional cruelty. Tennessee Code Annotated section 40-35-114(5) provides that a trial court may consider whether a "defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense" in enhancing a defendant's sentence. The appellant acknowledges that this enhancement factor is typically applied when a victim is tortured, but he maintains that the evidence did not establish that the appellant tortured the victim.

The court placed the "greatest weight" on the appellant treating the victim with exceptional cruelty. See Tenn. Code Ann. § 40-35-114(5). The court said that "common sense tells the Court that this occurred over a period of time and it started with the hog-tying of her because it was through the hog-tying of her that he more readily and easily was able to stuff the sock down her throat." The court noted that although the medical examiner could not definitively determine how long it would have taken the victim to asphyxiate, the proof adduced at trial indicated that it had taken longer than a few seconds. The court said that the appellant did not have to hog-tie the victim to accomplish the murder. Further, the court observed that the sock in her throat and the cord around her neck did not "prevent her totally from breathing, but slowly resulted in her inability to breathe sufficiently." The court said that proof at trial suggested that there was a "lack of significant blood around the neck area . . . because it was in all likelihood she was probably close to death." Therefore, the trial court found that the appellant's behavior went well-beyond what was necessary to cause the murder.

In State v. Arnett, 49 S.W.3d 250, 258 (Tenn. 2001), our supreme court concluded that the exceptional cruelty factor is applicable in cases of "extensive physical abuse or torture." In the instant case, the appellant tightly hog-tied the victim, stuffed a sock down her throat, sliced her throat several times, and tightly wrapped a shirt and an electrical cord around her neck. See State v. Alvarado, 961 S.W.2d 136, 151 (Tenn. Crim. App. 1996); State v. Johnson, 970 S.W.2d 500, 507 (Tenn. Crim. App. 1996). The trial court found that the circumstances of the offense indicate that the murder occurred slowly over a period of time while the victim was immobilized and terrorized. We conclude that the trial court properly considered this enhancement factor.

Further, we note that the trial court also found that the appellant used a deadly weapon in the commission of the murder. See Tenn. Code Ann. § 40-35-114(9). The court said that the sock stuffed down the victim's throat and the electrical cord which was tied tightly around the victim's neck were deadly weapons in that they were "capable of causing death or serious bodily injury." See Tenn. Code Ann. § 39-11-106(a)(5)(B) (providing that a "deadly weapon" is "[a]nything that in the manner of its use or intended use is capable of causing death or serious bodily injury.") This court has previously concluded that "[o]bjects other than traditional weapons may, depending on their use, be deadly." State v. Eaves, 959 S.W.2d 601, 604 (Tenn. Crim. App. 1997). In fact, "[a] pillow, a sock, telephone wire, a hairbrush, and a long-handled flashlight have all been held to constitute deadly weapons because of the manner in which they were used." Id.; see also State v. Haynes, 720 S.W.2d 76, 81 (Tenn. Crim. App. 1986); State v. Thomas Vincent Jackson, No. 03C01-9201-CR-34, 1993 WL 87831, at *2 (Tenn. Crim. App. at Knoxville, Mar. 26, 1993). Regardless, the court noted that the appellant also used a knife during the commission of the offense. The court observed that the victim was five feet and one-half inches tall and weighed about a hundred pounds while the appellant was over six feet tall and weighed about 240 pounds.

The court stated that the large size discrepancy between the appellant and the victim "made the instruments even more likely to cause death or serious bodily injury." The proof justifies the application of this enhancement factor.

The appellant also contends that because the trial court stated that the appellant should have been convicted of first degree murder, the court's imposition of the maximum sentence was arbitrary. Further, the appellant maintains that the trial court was unwilling to consider any mitigation offered by the appellant. The appellant contends that the trial court should have considered that he "has strong family support, has a high school education and attended college, has no history of criminal convictions, was employed at the time of his arrest, and was remorseful for the victim's death." See Tenn. Code Ann. § 40-35-113(13).

Regarding the appellant's criminal history, the trial court found that although the appellant had no prior criminal convictions, he nevertheless had a long history of drug use. The court also noted that the appellant repeatedly stole to support his drug habit and refused to pursue rehabilitative efforts. The court found that the appellant's continued drug usage was criminal conduct worthy of significant weight as an enhancement factor. See Tenn. Code Ann. § 40-35-114(1). We conclude that the trial court properly refused to apply the appellant's lack of criminal convictions in mitigation.

The court gave some weight in mitigation to the appellant's assistance to police in finding the victim's body and her car. See Tenn. Code Ann. § 40-35-113(9). However, the court also noted that the appellant gave police differing versions of events, essentially blaming the victim for her own demise. Therefore, his assistance to police was entitled to only minimal weight.

The court noted that the appellant had a poor work history, stating that the evidence demonstrated the appellant "worked off and on some in various restaurant jobs and a few thing[s] like that, but I think I counted maybe 28 months over his adult life or 38 months." Additionally, the court found that the appellant's relationship with drugs was stronger than his relationship with his family. We conclude that the trial court did not err in failing to mitigate the appellant's sentence based upon his work history and strong family connections.

Finally, the trial court rejected the appellant's contention that he was remorseful for the victim's death. The court said:

> I forgot which one of the family members testified, but she . . . was testifying about his glare in his eyes and this type of thing and I concur with them 100 percent. I have yet to see anything other than a cold hard stare on [the appellant's] face since he first entered this courtroom some year and a half ago. I found

> it most interesting he hasn't seen his loving mother or loving sister since November or October of 2005, and they walk into this courtroom today and both of them get on the stand and show true remorse and crying and everything else and [the appellant] didn't flinch. He looked at them with the same look he looks at everybody else and that is cold, emotionless. The words that he put on some paper that his attorney probably assisted him in preparing is meaningless to the Court and is an insult to the family. [The appellant] has no more remorse for these events than a hungry dog does when he steals a bone off a plate. I did notice one time today, because I kept looking at him during the trial just to see if I could . . . see any emotional reaction when his own family testified, and there was none. . . . I don't know if this man has any feelings other than for himself. . . . [I]f he does, he's never shown it in this courtroom and I don't know how many times he's been in this courtroom, 20, 25 times, I have yet to see a look on his face different than he's been showing here today, the same he showed during the course of the trial. And then, to make it worse, going back to the fact that he several occasions implicated her as the perpetrator of this whole event, because of her attempted suicide . . . . If that's his definition of remorseful, then he is much scarier than a lot of people recognize.

The court opined that the appellant's lack of honesty, his failure to accept responsibility, and his lack of remorse reflected poorly on his rehabilitative potential. Based upon the foregoing, the trial court imposed a sentence of twenty-five years for the second degree murder conviction. Our review of the record leads us to conclude that the evidence supports the sentence imposed by the trial court.

III. Conclusion

Finding no reversible error, we affirm the judgment of the trial court.

NORMA McGEE OGLE, JUDGE